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Testimony of

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before the

United States House of Representatives
Energy and Commerce Committee
Subcommittee on Telecommunications and the Internet

regarding the

Staff Discussion Draft of the DTV Transition Act of 2005

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Consumers Union[1] and Consumer Federation of America[2] appreciate the opportunity to testify on the transition from analog to digital television. We are grateful to Chairman Barton and members of this Subcommittee for their leadership on these important consumer issues.

We agree, as the staff discussion draft suggests, that the transition to digital television as envisioned by the 1996 Telecommunications Act has failed, requiring additional congressional action to ensure a smooth transition and to protect American consumers.

Setting a hard date for the conversion from analog to digital and return of the analog spectrum may play an important role in meeting the underlying goals of the Act. However, any legislation that this Subcommittee takes up to on the digital transition must:

- Ensure that consumers do not bear the financial burden of the transition or suffer from the loss of television signals they rightfully expect to receive;

- Promote market competition, rather than consolidation, through appropriate allocation of the 108MHz of returned spectrum to new entrants and smaller existing market players, particularly in the area of broadband wireless;

- Promote unlicensed use of spectrum by both commercial and non-commercial entities in either the retained or returned spectrum to promote competition, offer advanced communications services, and bridge the digital divide; and

- Prevent further concentration of local media markets by ensuring that a portion of the remaining 6 MHz is used to provide more news, information and entertainment from *independent* sources and addressing ownership restrictions for dominant local broadcast outlets.

Although the discussion draft requires important broad-based consumer education by retailers and manufacturers to help ease the transition, it fails to address the four critical needs identified above. As a result, Consumers Union and Consumer Federation of American oppose the draft in its current form. We look forward, however, to working with you to ensure that any legislation reported by the Subcommittee incorporates these core consumer provisions. We elaborate on these critical needs below.

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[1] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the state of New York to Provide consumers with information, education and counsel about good, services, health and personal finance, and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of *Consumer Report*s, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* with more than 5 million paid circulation, regularly, carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

[2] The Consumer Federation of America is the nation’s largest consumer advocacy group, composed of over 280 state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power an cooperative organizations, with more than 50 million individual members.

Hold Consumers Harmless

Consumers buy televisions with the reasonable expectation that they will be able to receive broadcast signals over the life of the set. And that life can be substantial. Research from Consumer Reports shows that televisions are the workhorses of consumer electronics: they last for decades. Even today, as Congress focuses on a hard digital television transition date, millions of consumers are buying new analog sets on the assumption they will work for years to come. The digital transition turns that assumption on its head: for consumers relying on over-the-air broadcasts, the sets will be useless for their primary purpose. Any conversion to digital television must ensure that this expectation will continue to be met without imposing additional costs.

The number of consumers that could be left in the dark without further congressional action is substantial. Currently, 21 million households rely solely on over-the-air broadcasts. Another 16 million cable and satellite households have at least one television that is not connected to their cable or satellite service.[3] All these sets will go dark after the transition unless consumers buy digital-to-analog converter boxes.

The costs to individual households to purchase those boxes will likewise by substantial. With estimates of their cost at between $50 and $60, the digital conversion effectively increases the cost of television sets consumers have already purchased. According to the Consumer Electronics Association, a 25-inch television—the most popular set—sells on average for about $200. A $50 converter box increases the cost of that set by 25 percent. The costs of smaller sets selling for $100 dollars would effectively increase by 50 percent. Given that, according to the Government Accountability Office (GAO), the average over-the-air household has two televisions, the costs are double—effectively a consumer tax of $100 or more just to facilitate a transition that benefits broadcasters, equipment makers, retailers and other industry players.

Unless Congress makes changes to the discussion draft under consideration and provides a full consumer subsidy, Congress will impose dramatic cost increases and substantial inconvenience on consumers.

At the macro-level, the consumer cost of the transition is startling. GAO estimates the cost of purchasing new converter boxes for relevant households to be as much as $2 billion. Other estimates suggest the costs could rise to nearly $3 billion. It is completely unacceptable for consumers to bear these costs just to be able to receive over-the-air broadcasts their sets used to provide.

Though we support provisions of the discussion draft designed to hold cable and satellite subscribers harmless by providing for down-conversion of digital signals, the draft, in its most serious shortcoming, omits provisions to hold harmless the 37 million households that continue to rely on over-the-air broadcasts. Congress must establish a full consumer subsidy program for digital-to-analog converter boxes for all over-the-air households in a manner that does not impose costs on consumers. And cable and satellite subscribers must be certain they will receive all broadcast channels from their service providers.

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[3] Digital Broadcast Television Transition: Estimated Cost of Supporting Set-top Boxes to Help Advance the DTV Transition. February 17, 2005, Government Accountability Office, GAO-05-258T

This principle is not new to this Subcommittee. The Commercial Spectrum Enhancement Act (CSEA), enacted in 2003, has been instrumental in encouraging the development of new uses for spectrum. But that law also stipulates that auction proceeds must cover 110 percent of the costs of relocation. While the law does not apply in this case, Congress must recognize the significant costs it will impose on consumers, and hold them harmless for policy decisions that will substantially benefit other parties. Broadcasters, who demanded the ability to go digital in the first place, incurred their costs willingly. But, according to the New American Foundation, sales of digital-ready televisions represented just four percent of all televisions sales in 2004, suggesting public demand for digital television is insignificant. For DTV transition legislation, the Subcommittee therefore should adopt a principle similar to that embodied in the CSEA: digital transition costs to consumers should be paid *not* from their pockets but by proceeds from future spectrum auctions or by the industries that will benefit from the transition.

The digital transition may, if managed appropriately, provide significant public benefits. But, unquestionably, it will be viewed as an abject failure by consumers if they are forced to bear the costs of acquiring digital-to-analog converter boxes or face the equally unpalatable alternative of losing access to over-the-air television.

Promote Market Competition

It is unacceptable to have two incredibly valuable, publicly owned blocks of spectrum—for which the broadcast industry paid nothing—remain underutilized. However, how this spectrum is allocated at auction will determine whether the U.S. broadband market grows more concentrated or benefits from greater market competition. Cable providers and telephone companies offering DSL dominate their markets and don't compete against each other outside of their territories. Data supplied by the Federal Communications Commission and J.P. Morgan show that the high-speed product space is highly concentrated; in fact, it has become a cozy duopoly. As a result of weak competition, broadband penetration in the U.S. is proceeding at a slower rate than many other countries—the U.S. now ranks 16th in the world.

And if the merger between Sprint and Nextel is approved, just three companies will dominate the wireless industry. The owners of two of those wireless companies—Verizon and SBC—are near-monopoly telephone companies that also dominate local and long-distance calling throughout the United States. Other, smaller wireless companies remain minor players that lack the spectrum needed to compete and match services over the long-term.

Congress has the important opportunity to ensure that spectrum made available from the analog give-back will facilitate robust competition in the broadband market—providing new opportunities for smaller cell phone companies and other wireless providers to access valuable spectrum that will allow them to better serve their customers and effectively compete in the marketplace. In addition, if portions of this spectrum were made available for wireless community networks, consumers could receive substantially lower broadband prices from an important competitive alternative to dominant market players.

But if rights to this valuable spectrum are available only to the dominant wireless carriers as smaller players are priced out of the market, the auctions will only make a badly concentrated market even less competitive—undercutting quality of service, reducing choices and inflating prices. As the findings of the discussion draft bill indicate, newly available spectrum could be used for wireless broadband in rural and urban communities. Even licensed options could be new alternatives to the incumbents for high-speed Internet access.

Unfortunately, despite this finding, the discussion draft remains silent on the allocation of newly available, high-quality spectrum for unlicensed use by providers of community wireless internet services or for other purposes. This virtually ensures the auctioning of spectrum to dominant wireless providers that already control the bulk of this concentrated market. The Subcommittee should ensure that of the estimated 108 MHz to be returned and offered at auction, adequate spectrum is reserved for new market entrants and small existing players. Doing so will put pressure on the largest market players to compete, resulting in lower consumer prices, higher quality, and expanded choices.

Promote Unlicensed Use of Spectrum

The findings of the draft legislation observe that the use of spectrum for wireless broadband is an important public policy goal. Unfortunately, the draft does nothing to advance unlicensed use of spectrum for wireless services, such as high-speed, community wireless Internet. This flaw that must be corrected if the digital transition is to offer any significant benefit to the public.

The growth of unlicensed use of spectrum in what used to be known as “junk bands,” through the application of wireless Internet technologies like Wi-Fi, is one of the most remarkable accomplishments of the past decade. It expands the ability of ordinary citizens to use and share the public airwaves. But the potential to further expand the ability of the people to use their airwaves is constrained by relegating unlicensed use to these “junk bands.”

The “junk bands” were given this moniker precisely because the signals that can be transmitted at these frequencies are limited—the signals do not pass through walls or trees like TV signals do. And many other devices—like garage door openers, microwaves and cordless phones—use the same space. But what is important is the frequency on which they operate, not what kind of information they’re sending, such as TV or Internet signals.

If the principle of sharing the spectrum in a non-interfering manner is extended to other parts of the spectrum, the potential to deliver broadband and other communications services at lower costs will expand dramatically. Congress can and should expand the space in which the unlicensed or noncommercial use of the airwaves is encouraged and allowed. It can do so in three ways.

First, it should set aside a small part of the recovered analog spectrum to be dedicated for unlicensed use. A set aside of 10 percent of recovered spectrum on a nationwide basis would open a substantial space to promote unlicensed uses.

Second, it can set aside a small part of the digital spectrum, which was given to the broadcasters on an exclusive basis and at no charge, for unlicensed use. Congress cannot ignore the fact that the digital spectrum is the largest part of the spectrum made available to private entities not subject to auction.[4] With the windfall provided to broadcasters in the 6MHz they will be allowed to retain, broadcasters will be able to provide six or more digital channels—far more than ever anticipated when Congress enacted the 1996 Telecommunications Act—where they previously offered one. Instead of moving to the equivalent of six channels, the Congress can set aside part of the digital spectrum for unlicensed use. This could be accomplished as part of the process of assigning full power channels, which the legislation contemplates. Again, a 10 percent set aside would open a substantial space to promote unlicensed uses.

Third, Congress should enact clear public policy that supports the non-infringing sharing of other parts of the spectrum. In many other parts of the spectrum, frequencies remain unused during all, or part of the day. These are referred to as "white spaces." They are unused because "dumb, old technology" cannot dynamically move into and out of these spaces. These white spaces are particularly unnecessary in rural areas. "Smart radio" technologies can use these frequencies without interfering with other uses. Under current rules and proceedings, the Federal Communications Commission has moved haltingly to expand the non-interfering uses of the spectrum. A clear public policy promoting the non-interfering use of spectrum would speed the process along and allow unlicensed sharing of spectrum to advance much more rapidly.

The unlicensed use of even a small portion of newly available spectrum would provide untold public benefits. Among many, perhaps the most notable is the opportunity to support expansion of community wireless internet services, offering perhaps the first meaningful opportunity for bridging the digital divide that has confounded policy makers for more than a decade.

Address Media Ownership

At a time when concerns about competition, cost and diversity of programming have prompted a revisiting of media ownership rules, the DTV transition could worsen the problem in local markets. Congress should not ignore the serious implications digital transmission has on media concentration.

We have significant concern about the power provided to local news companies that already own and control local newspapers and radio stations being provided with the capacity to offer six or more digital channels where they previously offered one.

Though all local broadcasters will receive the same new digital capacity, they cannot all take equal advantage of it. Only a few stations in any market currently produce or offer local news.

A Consumers Union/Consumer Federation of America study of station ownership between 1975 and 2000, found that the number of television station owners fell from 540 to 360

[4] Certain parts of the spectrum have been set aside or assigned for public governmental uses, like defense, safety and education, and not subject to auction. The original cellular licenses were also given as a gift to licensees.

and the overall number of stations rose. But the number of TV newsrooms declined during this same period. In fact, only half of all broadcast TV stations provide news. Stations with newsrooms, particularly those affiliated with large news conglomerates, will be better able to utilize the additional digital capacity, dominating local news carriage, reducing diversity of news and information, and increasing the volume and impact of a single owner's voice in the news marketplace in their community.

In 2003, millions of Americans, a bipartisan coalition from the House, a majority of the Senate and leaders from both parties raised concerns about media conglomerates owning two stations in most markets, or three stations in the largest ones. Unless Congress acts to prevent it, the digital transition has the very real potential to substantially increase the ability of a few broadcast giants to dominate local news markets nationwide.

Of the 6 MHz of spectrum that will remain with broadcasters post-transition, Congress should allocate a portion of it for exclusive use by diverse and independent sources of local news and information. Congress should also consider adopting new rules that specifically address the concentration of local news content providers that the transition will facilitate.

Serving the Public Interest

In exchange for the privilege of free and exclusive use of the public airwaves, broadcasters must serve the "public interest, convenience and necessity" through the fulfillment of public interest obligations, such as the provision of educational, civic, political and other programming. Among many shortcomings of these obligations, however, has been the ability of the broadcasters themselves to define what constitutes programming in the public interest. In addition, compliance with overly vague obligations is difficult both to verify and enforce. In short, these obligations have failed to serve the public.

The FCC should hold broadcasters accountable for their public interest obligations, both now and after the DTV transition, preferably through quantifiable and enforceable requirements. These are worthy goals and they should be met. However, given the historical and inevitable shortcomings of these obligations, improvements to the public interest obligation in any digital transition legislation will be insufficient to serve the public interest.

Such provisions are neither an effective nor equivalent substitute for legislative requirements allocating spectrum to promote market competition and unlicensed and noncommercial use or for requirements allocating a portion of retained spectrum for independent local news, information, or entertainment programming.

There is little debate that, to date, the obligations of broadcasters have failed the public interest. In order to serve it, Congress must address the critical competitive, diversity and ownership concentration issues we have raised in our testimony through the effective, equitable and appropriate allocation of one of the most valuable publicly owned resources—radio spectrum. If Congress takes these steps, it will provide far more meaningful public benefits than any improvement to public interest obligations can offer.

Summary

As we said in our testimony on this issue in 2002, “Consumers will not thank Congress for digital television if it also means they have Congress to thank for higher prices and inconvenience when they buy new TVs and new computers, or integrate their home entertainment systems.” That statement remains true today.

Digital television is a positive technology that has the potential to benefit consumers and the public as a whole. But it must be rolled out in accordance with competitive market principles in a manner that serves the public interest.

We look forward to working with the Subcommittee in stimulating a rapid transition to digital television broadcasting and to craft legislation that will resolve these important issues for both consumers and affected industries. But the burden and costs of the digital transition should properly rest on the broadcast, cable and satellite television providers, not on consumers.